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In The
Supreme Court of The United States

OCTOBER TERM, 1965

No. 365

LUX ART VAN SERVICE, INC., a California Corporation,
Petitioner,

vs.

ART POLLARD,
Respondent.

Opposing Brief to
Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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Respondent opposes the granting of the Writ of Certiorari prayed for in the Petition seeking a review of the Judgment entered by the United States Court of Appeals for the Ninth Circuit on April 20, 1965, for the reasons set forth herein.

OPINIONS BELOW

Petitioner's designation of the opinion below is not opposed.

JURISDICTION

This Court has jurisdiction of the Petition by virtue of 28 U.S.C. 1254(1).

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner's statement of the case overlooks certain material portions of the record and the following additions to the synopsis of the evidence will assist the Court in its decision.

In January, 1962, Pollard's mare, Chinchilla, was transported by Pollard's foreman from Pollard's ranch in southeastern Arizona to the Vessels Ranch in southern California to be bred to a champion stallion owned by Vessels (R.234-235). Pollard testified that he had never shipped any of his racing or breeding horses by common carrier and that such stock were always shipped by his own personnel in his own special trailers due to their great value (R.233). Pollard had sent other horses to the Vessels Ranch on previous occasions and had on each occasion transported them there and back by his own personnel using his own equipment (R.237). On these prior occasions Vessels had always called Pollard when the horses were ready to come home (R.237).

The mare's stay at Vessels Ranch would normally have been from a three to six month period (R.236). During this time Pollard had no control over the facilities in which the mare was kept, (R.237) nor did Pollard exercise or have the right to exercise any control over the manner in which the breeding or the care of the mare was to be accomplished (R. 237-238). Pollard was not to oversee the breeding or care of the mare in any way, nor did he in fact do so (R. 238). None of Pollard's employees were to care for the mare nor did Pollard have any employees at Vessels Ranch for this or any other purpose (R. 238). Pollard had absolutely no control over any personnel at Vessels Ranch while the mare was in their possession nor were any of the Vessels employees subject to Pollard's control in any way (R. 238). Pollard never gave to the Vessels Ranch or to the employees or to any other person authority to ship his mare, nor did he ask Vessels or anyone else to send her or bring her back home when the breeding was finished (R. 239). Pollard was merely to pay the

mare's board bills and veterinarian expenses while she was at Vessels Ranch (R.236). Pollard's sole understanding with Vessels' Ranch was that he was to be notified when the mare was ready to return home, and he was never so notified (R. 239).

About midnight on the day the mare died, Petitioner's driver called Pollard at Pollard's home in Arizona to report that his mare was dead (R. 241). Pollard testified that he had never even been aware of the existence of the Petitioner until that phone call (R. 241), and that he had never had any business dealings with Petioner (R. 240). Pollard testified that he had never seen the bill of lading containing the limitation of liability until after the litigation had begun (R. 241-242); that he had never authorized Vessels' Ranch or any of its personnel to sign the same in his behalf (R. 242) or to ship his horse at all (R. 239). He further testified that he had no personal knowledge of how his horse came to be in possession of the Petitioner (R. 243-244) and that neither Vessels' Ranch nor any of its employees had ever been Pollard's employees or agents for any purpose (R. 244). Moreover, Petitioner's president, one Ernest Baum, testified there was no evidence that Pollard was aware of any custom or practice that might have grown up between the Petitioner and Vessels' Ranch in regard to the shipment of horses (R. 237).

REASONS FOR NOT GRANTING THE WRIT

I

THE JUDGMENT OF THE COURT OF APPEALS SHOULD NOT BE REVIEWED BECAUSE IT IS NOT, AS PETITIONER CONTENDS, IN CONFLICT WITH THE DECISION OF THE SUPREME COURT IN GREAT NORTHERN RAILWAY CO. v. O'CONNOR, 232 U.S. 508, 34 S. Ct. 380, 58 L. Ed. 703.

The O'Connor case is clearly distinguishable from the instant case upon its facts:

In the O'Connor case, Gertrude O'Connor specifically employed an agent for the express purpose of packing, delivering to a carrier for shipment, and shipping certain personal property. The agent was in fact a transfer company engaged in that sole endeavor. As Mr. Justice Lamar stated in the O'Connor case,

> ". . .The Boyd Transfer Co. was employed by the Plaintiff on terms not stated, to box, transfer and ship certain property which she desired to have sent to Portland, Oregon. . ." (Petition, Page 17)

Again, Justice Lamar stated:

> ". . .She employed the Boyd Transfer Co., which was also a forwarder, to box and ship the property from Minneapolis to Portland. . ." (Petition, pages 20-21)

As an incident to the shipping of the goods, Mrs. O'Connor's agent executed a shipping document containing a limitation of the carrier's liability. It apparently did so in violation of certain private instructions given the agent by Mrs. O'Connor. The goods were lost in transit and Mrs. O'Connor brought suit against the carrier for their value. The carrier set up as a defense the limitation of liability in the shipping document executed by Mrs. O'Connor's agent. The Supreme Court held that when Mrs. O'Connor gave to her agent express authority to ship, she thereby conferred upon her agent incidental authority to enter into a contract with the carrier concerning the carrier's liability, as an incident to the shipping transaction.

As the Court stated:

> ". . .The transfer company had been entrusted with goods to be shipped by railway, and nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon the terms of shipment. . ." (Emphasis supplied) (Petition, Page 22)

In the Pollard case, however, both the District Court and the Court of Appeals held that there was no express authority to ship given by Pollard to Vessels' Ranch.

Indeed, Petitioner in its brief at page five, concedes that Vessels' Ranch was not an agent of Pollard for the purposes of shipping the horse, but was a mere "bailee". The record clearly indicates that the bailee's authority was limited to breeding the horse and providing the necessary care during the breeding period: no authority was given by Pollard to the bailee to ship the horse, and in fact the bailee was specifically instructed to hold the horse until Pollard came to get it. The purposes for which the bailment was created and the limitations upon the powers of the bailee are set out in Respondent's Supplemental Statement of the Case with appropriate citations to the record.

Upon this record both the District Court and the Court of Appeals expressly held that Vessels' Ranch, the bailee, was not Pollard's actual or ostensible agent for the purpose of shipping the horse or for executing the bill of lading containing the limitation of liability. The shipping transaction between Vessels' Ranch

and the Petitioner was between those two parties alone. The Court of Appeals, in affirming the decision of the District Court, found that Pollard did not authorize the shipment of the horse, did not authorize the execution of the bill of lading containing the limitation of liability, and that as to these transactions, Pollard did not participate in them or approve them, and that he was not even aware of them.

It cannot be contended that the Court of Appeals was unmindful of the rule of law enunciated in the O'Connor case, for the Court of Appeals in its decision stated the O'Connor rule succinctly as follows:

> ". . .Authority to ship confers upon the agent incidental authority to enter into a contract with the carrier concerning liability." (Citing cases) (Petition, Page 11)

But, as the facts in the Pollard case established that there was no actual or apparent agency, or agency by estoppel, as contended by Petitioner, the Court of Appeals properly refused to apply the O'Connor rule to this altogether different state of facts, and instead applied the proper rule of law, which it summarized in the following quotation from the Restatement of Agency: (Petition, Page 13)

> "(a) Apart from statute, an undisclosed principal who entrusts an agent with the possession of a chattel, other than a commercial document representing a chattel or chose in action, but who does not authorize him to sell it, display it for sale, or otherwise affect the principal's interest in it, is not thereby bound by a transaction with respect to the chattel between the agent and a third person who believes the agent to be the owner."

Restatement of Agency (2d) Sec. 200 (1958)

Of course the Restatement rule is merely a "restatement" of the appropriate federal and state law on the subject.

Mere possession of personal property, standing alone, is not such indicia of ownership as will justify a third party in believing that the possessor is authorized to enter into transactions affecting the property:

John Clay and Co. Livestock Commission v. Clements, (C.A. Texas) 214 F. 2d 803

DeVries v. Sig Ellingson and Co., 100 F. Supp. 781, Affirmed 199 F.2d 677, Cert. denied, 73 S. Ct. 505, 344 U.S. 934, 97 L. Ed. 719

Irick v. Elkins, 38 N. M. 113, 28 P.2d 659

Bustin v. Craven, 57 N. M. 724, 263 P.2d 392

Adkisson v. Waitman, 202 Okla. 309, 213 P.2d 465

II

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS; THE COURT OF APPEALS APPLIED A RULE OF LAW WHICH WAS IN HARMONY WITH ITS OWN PRIOR DECISIONS, AND WITH DECISIONS OF OTHER COURTS OF APPEAL, IN THE SAME MATTER.

The rule is well settled among the Courts of Appeal that whether one acts independently, or as an agent with actual or ostensible authority, is a question for the trier of fact when the issues are disputed:

Seaboard Properties v. Bunchman, (C.A. Florida) 278 F.2d 679

Mitchell v. Southern Pacific Railway Co., (C. C. A. Cal.) 242 F.2d 598

J.J. Quinlan and Co. v. Holbrook, (C.C.A. Vermont) 162 F.272

Pacific Can Co. v. Hewes, (C.C.A. Wash.) 95 F.2d 42

Mitton v. Granite State Fire Insurance Co., (C. A. Colo.) 196 F.2d 679

Similarly, the existence of an estoppel is a question of fact and is to be determined by the trier of fact:

Albert v. Joralemon, (C.C.A. Ariz.)
271 F.2d 236

Quon v. Niagara Fire Insurance Company of N.Y. (C.C.A.Cal.)
190 F.2d 257

Peoples' Loan and Finance Co. v. Halbiesen Motor Company, (C.C.A. Georgia)
271 F.2d 538

N. Litterio and Co. v. Glassman Construction Co., (C.A.D.C.)
319 F.2d 736

Higgins v. Arizona Savings and Loan Association,
90 Ariz. 55, 365 P.2d 476

Cardosa v. Fireman's Fund Ins. Co.,
144 Cal. App. 2d 279, 300 P.2d 875

Hudson v. Morgan and Peacock Properties Co.,
170 Cal. App. 2d 328, 339 P.2d 180

31 C.J.S. Estoppel Sec. 163

The fact that the Court of Appeals in its decision emphasized that the carrier's negligence caused the loss is merely an application of a rule pronounced by this Court in Town of Orleans v. Platt, 99 U.S. 676, 25 L. Ed. 404, wherein the Court held that where one of two innocent persons must suffer loss, the loss falls upon the party who contributed to produce it.

It is interesting to note that the Supreme Court of North Dakota in considering a fact situation identical with the case at bar reached exactly the same conclusion as did the Court of Appeals in this case.

Schlosser v. Great Northern Railway Co.,
20 N.D. 406, 127 N.W. 502

III

THE QUESTION HERE INVOLVED IS NOT A FEDERAL QUESTION OF SUBSTANCE OR IMPORTANCE. THE SOLE QUESTION INVOLVED IS THE SUFFICIENCY OF THE EVIDENCE TO ESTABLISH AN ESTOPPEL AS AGAINST THE RESPONDENT.

Where a Court of Appeals affirms the findings of fact of the District Court on a disputed fact issue, the Supreme Court will not ordinarily review the sufficiency of the evidence to sustain the findings of fact.

Boehmer v. Pennsylvania Railroad Co.,
40 S. Ct. 409, 252 U.S. 496, 64 L. Ed. 680

The Poznan,
47 S. Ct. 482, 274 U.S. 117, 71 L.Ed. 455.

See also:

Hallendeck v. Leimert,
55 S.Ct. 687, 295 U.S. 116, 79 L.Ed. 1339

Indeed, this Court has previously refused to grant certiorari to review the sufficiency of evidence to establish an estoppel:

Hampton v. Paramount Pictures Corp., (C.C.A. Cal.)
279 F. 2d 100, 84 A.L.R. 2d 454, Cert. denied,
81 S. Ct. 170, 364 U.S. 882, 5 L.Ed 2d 103

IV

THE DECISION OF THE COURT OF APPEALS DOES NOT DEPRIVE PETITIONER OF ITS REMEDY AGAINST THE BAILEE.

Petitioner's allegation that under the decision of the Court of Appeals ". . .the Vessels' Ranch is insulated from liability. . . to the Petitioner," and that ". . .Petitioner cannot recover from the bailee for such misrepresentation. . ." is a non-sequitur. Vessels Ranch is not a party to this litigation and consequently none of the issues herein are res judicata as between Petitioner and Vessels Ranch, and Petitioner is free to pursue its remedy, if any it has, against Vessels Ranch for any misrepresentations as to its authority.

Arnstein v. Porter, (C.C.A. N.Y.)
154 F.2d 464

Pulitzer Publishing Co. v. Current News Features, (C.C.A. Mo.),
94 F.2d 682, Cert. denied, 58 S.Ct. 1040, 304 U.S. 570, 82 L.Ed. 1535.

Lewis v. Ingram, (C.C.A. Okla.),
57 F.2d 463, Cert. denied, 53 S.Ct. 16, 287 U.S. 614, 77 L. Ed. 533.

CONCLUSION

For the reasons set forth above, the Writ should be denied.

Respectfully submitted,

Raymond F. Hayes

Counsel For Respondent

PROOF OF SERVICE

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, RAYMOND F. HAYES, the attorney of record in this Court for ART POLLARD, the Respondent herein, depose and say that on the 23rd day of July, 1965, I served a copy of the foregoing Opposing Brief to Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by delivering the same to a clerk in the offices of SIDNEY WEISSBERGER, located at 603 Arizona Land Title Building, Tucson, Arizona, and to a clerk in the offices of JAMES L. RICHMOND, located at 304 Southern Arizona Bank Building, Tucson, Arizona, both counsel of record for LUX ART VAN SERVICE, INC., a California corporation, Petitioner herein.

Raymond F. Hayes

Subscribed and sworn to before me at Tucson, Arizona, this 23rd day of July, 1965.

Eva Ramirez
Notary Public

My Commission Expires:
October 20, 1968